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State of New York
Court of Appeals

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4 No. 18

The People &c.,
Respondent,
v.
Matthew Smith,
Appellant.

Paul J. Cambria, Jr., for appellant.
Tracey A. Brunecz, for respondent.

MEMORANDUM

This memorandum is uncorrected and subject to revision before publication in the New York Reports.

[ENTERED March 30, 2006]

MEMORANDUM:

The order of the Appellate Division should be affirmed.

After a bench trial, defendant was convicted of rape in the first degree and burglary in the second degree. Initially, defendant claims that his waiver of a jury trial did not comport with constitutional and statutory requisites (see NY Const, art I, § 2; CPL 320.10 [2]). The record indicates that defendant executed a written waiver of a jury trial in open court which was approved by the trial judge. The circumstances surrounding the waiver, moreover, support the conclusion that it was knowing, intelligent and voluntary.

Next, defendant asserts that his waiver was ineffective since the trial judge did not inquire as to his understanding regarding the waiver of a jury trial. The record reflects, however, that in defendant's presence the trial court inquired of defendant's counsel concerning his client's understanding of the rights waived. Although an allocution by the trial judge eliciting defendant's full understanding of the importance of the right being waived would have been better practice, no particular catechism is required to establish the validity of a jury trial waiver. The inquiry here, though minimal, was sufficient to establish that defendant understood the ramifications of such waiver (see People v Page, 88 NY2d 1 [1996]).

Finally, defendant contends that there was legally insufficient evidence from which the trier of fact could find him guilty of rape in the first degree (Penal Law § 130.35 [2]) and burglary in the second degree (Penal Law § 140.25 [2]). A "verdict is supported by sufficient evidence . . . [when] there is any valid line of reasoning and permissible inferences which could lead a rational person to the conclusion . . . [which] as a matter of law satisf[ies] the proof and burden requirements for every element of the crime charged" (People v Bleakley, 69 NY2d 490, 495 [1987]). Contrary to defendant's assertions, and viewing the evidence in the light most favorable to the People, as we must (see People v Contes, 60 NY2d 620, 621 [1983]), a rational person could conclude that the trial evidence was legally sufficient to support his conviction. The testimony of the victim, which was corroborated by other witnesses and by defendant himself, in conjunction with the

forensic evidence, permitted the finding of defendant's guilt of both crimes.

* * * * * * * * *

Order affirmed, in a memorandum. Chief Judge Kaye and Judges G.B. Smith, Ciparick, Rosenblatt, Graffeo, Read and R.S. Smith concur.

Decided March 30, 2006

STATE OF NEW YORK : SUPREME COURT
APPELLATE DIVISION : FOURTH DEPARTMENT

PEOPLE OF THE STATE OF NEW YORK,
Appellee,

MATTHEW SMITH,
Appellant.

CERTIFICATE GRANTING LEAVE TO THE NEW YORK STATE COURT OF APPEALS

Docket No.: KA 04-01857

[ENTERED APRIL 1, 2005]

Upon consideration of the leave application and argument submitted by Roger W. Wilcox, Jr., attorney for Appellant, Matthew Smith, and on argument and papers submitted by Assistant District Attorney, Tracey A. Brunecz, on behalf of the People of the State of New York in opposition, I hereby certify that this case involves questions of law which ought to be reviewed by the Court of Appeals.

Permission is hereby granted to the appellant, Matthew Smith, to appeal this case to the New York State Court of Appeals.

/s/SAMUEL L. GREEN
HONORABLE SAMUEL L. GREEN
Associate Justice of the Appellate Division
Fourth Judicial Department.

E N T E R E D : April 1, 2005

TO: LIPSITZ, GREEN, FAHRINGER,
ROLL, SALISBURY & CAMBRIA
ROGER W. WILCOX, JR., ESQ.
42 Delaware Avenue
Suite 300
Buffalo, New York 14202

HON. JAMES P. SUBJACK
Chautauqua County District Attorney
1 North Erie
Mayville, New York 14757
Attn: TRACEY A. BRUNECZ, ESQ.
Assistant District Attorney

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

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KA 04-01857

PRESENT: GREEN, J.P., SCUDDER, MARTOCHE, SMITH, AND LAWTON, JJ.

PEOPLE OF THE STATE OF NEW YORK, PLAINTIFF-RESPONDENT,

v. MEMORANDUM AND ORDER

MATTHEW SMITH, DEFENDANT-APPELLANT.

LIPSITZ, GREEN, FAHRINGER, ROLL, SALISBURY & CAMBRIA LLP, BUFFALO (ROGER W. WILCOX, JR., OF COUNSEL), FOR DEFENDANT-APPELLANT.

JAMES P. SUBJACK, DISTRICT ATTORNEY, MAYVILLE (RACHEL E. ROBERTS OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

[ENTERED March 18, 2005]

Appeal from a judgment of the Chautauqua County Court (John T. Ward, Jr., J.), rendered April 19, 2004. The judgment convicted defendant, after a nonjury trial, of rape in the first degree and burglary in the second degree.

It is hereby ORDERED that the judgment so appealed from be and the same hereby is affirmed.

Memorandum: Defendant was convicted, following a nonjury trial, or rape in the first degree (Penal Law § 130.35 [2]) and burglary in the second degree (§ 140.25 [2]). He was sentenced to concurrent seven-year determinate terms of incarceration and a three-year period of postrelease supervision. Defendant contends that the verdict is against the weight of the evidence and that the evidence is legally insufficient. We disagree.

Defendant, his male friend, and two females, including the victim, spent the afternoon and evening of July 29, 2002 waterskiing, drinking alcohol, and smoking marihuana. The victim testified that, around 2:00 A.M., she went to her apartment and fell asleep on her couch. She testified that she awoke to find the defendant "on top of" and "having sex" with her. The victim pretended to be asleep throughout the entire sex act. Defendant testified on his own behalf that he entered the victim's apartment through a side window because he saw the victim on the couch with a cigarette in her hand and was afraid for her safety. He further testified that all the sexual contact that evening was consensual and took place while the victim was awake.

"A person is guilty of rape in the first degree when he ... engages in sexual intercourse with another person ... [w]ho is incapable of consent by reason of being physically helpless" (Penal Law § 130.35 [2]), that is, "unconscious or for any other

reason ... physically unable to communicate to an act" (§ 130.00 [7]). The definition of physically helpless is broad enough to cover a sleeping victim (*see People v Krzykowski*, 293 AD2d 877, 879, *lv denied* 100 NY2d 643; *People v. Sensourichanh*, 290 AD2d 886; *People v Beecher*, 225 AD2d 943, 945). The testimony of the victim is having sex with her. Given that evidence, we reject the contention that there was legally insufficient evidence from which the trier of fact could have found defendant guilty of rape in the first degree (*see People v. Bleakley*, 69 NY2d 490, 495). We are likewise unpersuaded that the verdict is against the weight of the evidence (*see id.*). We have reviewed the victim's testimony and are unable to conclude that it was incredible as a matter of law (*see Sensourichanh*, 290 AD2d at 887; *People v. Neil*, 289 AD2d 611, 612, *lv denied* 97 NY2d 758).

All concur except GREEN, J.P., who dissents and votes to reverse in accordance with the following Memorandum: I respectfully dissent. There is no question that, based on the credible evidence presented at trial, a finding different than that of County Court would not have been unreasonable. We must, therefore, "'weigh the relative probative force of conflicting testimony and the relative strength of conflicting inferences that may be drawn from that testimony'" (*People v Bleakley*, 69 NY2d 490, 495). If we conclude that the trial court failed to give the evidence the weight it should be accorded, we must set aside the verdict (*see* CPL 470.20 [5]; *Bleakley*, 69 NY2d at 495). In my view, the trial court failed to give the evidence the weight it should be accorded in finding defendant guilty of rape in the

first degree based upon complainant's incapacity to consent (*see* Penal Law § 130.00 [7]; § 130.35 [2]). Unlike the sleeping victims in the Third Department cases relied upon by the majority (*People* v *Krzykowski*, 293 AD2d 877, *lv denied* 100 NY2d 643; *People v Sensourichanh*, 290 AD2d 886; *People v Beecher,* 225 AD2d 943), complainant did not make an immediate outcry, fight off, or otherwise rebuff the alleged attacker. Rather, she testified that she fell back to sleep and deferred reporting the alleged attack until she spoke with her friend the following day. In addition, complainant testified that, during the purported rape, she could have communicated her unwillingness to engage in sexual intercourse but elected not to do so. The conduct of complainant during and following the encounter with defendant undercuts the credibility of her allegation that the sexual act was nonconsensual as the result of her physical incapacity. Defendant, on the other hand, provided a credible account of a consensual sexual act following a long day of drinking. In my view, the weight of the credible evidence and the reasonable inferences that may be drawn therefrom do not support a finding that defendant engaged in sexual intercourse with complainant when she was incapable of consent (§ 130.35 [2]) or that he entered her apartment with intent to commit a crime therein (§ 14 0.25 [2]). I would therefore reverse the judgment of conviction, dismiss the indictment and remit the matter to Chautauqua County Court for proceedings pursuant to CPL 470.45.

In addition, in my view the People failed to discharge their burden of establishing that defendant waived his right to a jury trial in

conformity with constitutional and statutory requirements (*see* NY Const, art I, § 2; CPL 320.10 [2]; *People v Davidson*, 136 AD2d 66, 70). The record does not establish that defendant actually signed the written waiver instrument in open court (*see People v Finkle*, 262 AD2d 971, 972, *appeal dismissed* 94 NY2d 942; *Davidson*, 136 AD2d at 70). Nor does the brief exchange between the court and defense counsel support the inference that defendant's "waiver of so fundamental a right was 'made knowingly and understandingly, based on an intelligent, informed judgment'" (*Davidson*, 136 AD2d at 70, quoting *People v Duchin*, 12 NY2d 351, 353). The court never explained the nature and consequences of the waiver (*cf. People v Yousef*, 236 AD2d 868, 869, *lv denied* 90 NY2d 866), inquired into defendant's understanding of the waiver (*cf. People v Buckley*, 299 AD2d 417, 418, lv *denied 99* NY2d 580; *People v Watson*, 162 AD2d 360, 361), or even addressed defendant on the subject of the waiver. Defendant never acknowledged the waiver or provided any indication that he understood it (*cf. Buckley*, 299 AD2d at 418; *People v Ahl*, 243 AD2d 985, 986, *lv denied* 91 KFY2d 868; *Yousef*, 236 AD2d at 869). Defendant has no prior criminal record (*cf.* Watson, 162 AD2d at 361), and nothing in the waiver instrument or the record of the court proceedings provides any assurance that he was "fully aware of the consequences of the choice he [was] making" (CPL 320.10 [2]). Thus, I would also reverse the judgment of conviction on the further ground that the record fails to establish the knowing and intelligent waiver by defendant of his right to a jury trial.

Entered: March 18, 2005

JOANN M. WAHL
Clerk of the Court

STATE OF NEW YORK
COUNTY COURT : COUNTY OF CHAUTAUQUA

The People of the State of New York

-vs- IND. #02-408

Matthew Smith,
Defendant

Tracey A. Brunecz, Esq.
Assistant District Attorney
Chautauqua County
For the People

Leonard E. Krawczyk, Jr., Esq.
Correll Mansion
484 Delaware Avenue
Buffalo, New York 14202
For the Defendant

WARD, J.

VERDICT/ORDER

[ENTERED January 22, 2004]

Defendant, indicted for Rape in the First Degree and Burglary in the Second Degree, signed a written waiver of jury trial and, consequently, a bench trial was held before me on those charges on January 13, 2004.

At the conclusion of the summations by the attorneys, and with the consent of the parties, this Court reserved decision.

The Court now renders the following verdict:

(1) On Count One, Rape in the First Degree: Guilty

(2) One Count Two, Burglary in the Second Degree: Guilty

Defendant's bail is revoked effective February 6, 2004. Defendant shall surrender to the custody of the Chautauqua County Jail on that date and remain there until sentencing. Sentencing is set for March 29, 2004 at 10:00 a.m. unless a sooner date is requested by the Department of Probation.

A pre-sentence investigation is ordered.

This constitutes the decision, verdict and order of the court.

Date: January 22, 2004
Mayville, New York

/s/ John T. Ward
Hon. John T. Ward
County Court Judge

At a term of the Appellate Division of the Supreme Court of the State of New York, held in and for the Fourth Judicial Department at the Courthouse located at 50 Delaware Avenue, Buffalo, New York, on the 28th day of March 2005.

PRESENT: HONORABLE SAMUEL L. GREEN
Justice Presiding

STATE OF NEW YORK : SUPREME COURT
APPELLATE DIVISION :
FOURTH DEPARTMENT

PEOPLE OF THE STATE OF NEW YORK,

Appellee,

vs.

Docket No.
KA 04-1857

MATTHEW SMITH,

Appellant.

APPLICATION FOR LEAVE TO APPEAL TO THE COURT OF APPEALS PURSUANT TO CPL § 460.20 and 22 NYCRR § 1000.13(P)(4); and APPLICATION FOR STAY OF JUDGMENT PENDING APPEAL TO COURT OF APPEALS PURSUANT TO CPL § 460.60

Appellant, Matthew Smith, by and through his attorneys, Paul J. Cambria, Jr. and Roger W. Wilcox, Jr., hereby applies for leave to appeal to the Court of Appeals pursuant to CPL § 460.20 and 22 NYCRR § 1000.13(p)(4). Appellant also seeks a continuation of the stay of judgment previously granted during the pendency of this leave application and, if granted, during the appeal before the Court of Appeals. Appellant's applications are supported by the affidavit of Roger W. Wilcox, Jr., attached hereto.

LIPSITZ, GREEN, FAHRINGER,
ROLL, SALISBURY & CAMBRIA LLP
ROGER W. WILCOX, JR., ESQ.
Attorneys for Defendant/Appellant
42 Delaware Avenue, Suite 300
Buffalo, New York 14202
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STATE OF NEW YORK : SUPREME COURT
APPELLATE DIVISION : FOURTH DEPARTMENT

PEOPLE OF THE STATE OF NEW YORK,

Appellee,

vs.

Docket No.
KA 04-1857

MATTHEW SMITH,

Appellant.

STATE OF NEW YORK)
COUNTY OF ERIE) ss:
CITY OF BUFFALO)

Affidavit of Roger W. Wilcox, Jr. in Support of Appellant's Application for Leave to Appeal to the Court of Appeals Pursuant to CPL § 460.20 and 22 NYCRR 1000.13(p)(4) and Appellant's Application for a Stay of Judgment Pending Appeal Pursuant to CPL § 460.60

Roger W. Wilcox, Jr., being duly sworn, deposes and says:

1. I am an attorney at law duly licensed to practice in the State of New York and I am senior partner with the law firm of Lipsitz, Green, Fahringer, Roll, Salisbury & Cambria LLP, with offices located at 42 Delaware

Avenue, Suite 300, Buffalo, New York. I represent the appellant, Matthew Smith, on various post-verdict matters including the appeal of his conviction and sentence.

2. I submit this affidavit in support of Mr. Smith's application for leave to appeal to the Court of Appeals, and in support of his application for a stay of judgment pending determination of this leave application and, if granted, during the appeal to the Court of Appeals.

3. CPL § 460.20 authorizes Justices of the Appellate Division to consider and grant an application for leave to appeal to the Court of Appeals. Pursuant to the rules of this Court, appellant may seek leave to appeal in a criminal matter by submitting an application for such relief to any member of the panel of justices who determined his appeal. 22 NYCRR § 1000.13(p)(4).

4. No other application for leave to appeal to the Court of Appeals has been made.

PROCEDURAL BACKGROUND

5. On or about October 30, 2002, Mr. Smith was charged by a Chautauqua County grand jury with counts of Rape in the First Degree (Penal Law §130.35[2]) and Burglary in the Second Degree (Penal Law §140.25[2]).

6. A bench trial of this matter was held on January 13, 2004. Appellant was convicted of Rape in the First Degree and Burglary in the Second Degree, by written order dated January 22, 2004.

7. On April 19, 2004, Mr. Smith's motion to set aside the verdict pursuant to CPL §330.30 was denied and he was sentenced to two concurrent terms of seven years' incarceration.

8. Prior to and during trial, Chautauqua County Court Judge Ward permitted Mr. Smith to remain free on $20,000 bond, $5,000 cash. During the time that he was at liberty, Mr. Smith appeared at every scheduled court date as instructed. Significantly, on February 6, 2004, Mr. Smith was scheduled to turn himself in to await sentencing; he appeared and, on that date, Judge Ward allowed him to remain free on bail until his sentencing date of April 19, 2004.

9. On April 19, 2004, Mr. Smith filed a Notice of Appeal from the aforesaid judgment of conviction to the Appellate Division of the Supreme Court, Fourth Judicial Department, by filing a written Notice of Appeal in duplicate with the Chautauqua County Clerk and by serving a copy thereof on Chautauqua County District Attorney James P. Subjack, Esq. (see, Notice of Appeal attached hereto as Exhibit A).

10. On or about April 20, 2004, Your Honor granted appellant's order to show cause seeking a stay pending appeal to the Appellate Division, Fourth Judicial Department.

11. Appellant has remained free during the course of this appeal after posting bail of thirty thousand dollars ($30,000.00) cash as ordered by Your Honor.

12. Appellant's appeal was timely perfected, and oral argument of this matter was heard on January 12, 2005.

13. In a Memorandum and Order entered March 18, 2005, a majority of the panel comprised by Justice Scudder, Justice Martoche, Justice Lawton, and Justice Smith voted to affirm appellant's convictions.

14. Your Honor dissented, concluding (1) that Mr. Smith's conviction was against the weight of the evidence, (2) that the trial record did not establish that appellant signed the jury waiver in open court as required by law, and (3) that the record does not support an inference that appellant knowingly and intelligently waived his right to a jury trial.

15. The Memorandum and Order is attached hereto as Exhibit A.

16. Appellant received a copy of the Memorandum and Order from the Court on March 21, 2005.

Respondent has not yet served appellant with a copy of said Memorandum and Order.

17. On March 24, 2005, Assistant District Attorney Tracey A. Brunecz advised your deponent that she has sought a surrender order from Judge Ward. Appellant has not yet been served with such an order.

The Decision of the Appellate Division

18. The pertinent facts of this matter have previously been set forth in the briefs submitted to the Court on Mr. Smith's appeal, and since those facts necessarily have not changed, appellant relies on them for the purposes of this leave application. Copies of all briefs submitted by appellant and by respondent are submitted herewith for the Court's review.

19. On appeal, appellant raised the following arguments:

    a. That his convictions were against the weight of the evidence and were not supported by legally sufficient evidence;

    b. That appellant's jury waiver was not lawful;

    c. That bad acts were improperly admitted into evidence against appellant; and

d. That appellant's sentence was harsh and excessive.

20. The majority decision considered and rejected appellant's legal sufficiency and weight of the evidence claims.

21. Curiously, the majority decision did not acknowledge, much less analyze, the jury waiver, bad acts evidence, and sentencing issues also raised by appellant.

22. These issues were, however, addressed in detail in Your Honor's dissent, and appellant respectfully submits that leave to appeal to the Court of Appeals should be granted on the grounds stated in the dissenting opinion.

LEGAL ARGUMENT IN SUPPORT OF APPLICATION FOR LEAVE TO APPEAL TO THE COURT OF APPEALS PURSUANT TO CPL § 460.20 AND 22 NYCRR § 1000.13(P)(4)

I. Appellant Did Not Validly Waive His Right to a Jury Trial

23. The right to a jury trial is "fundamental to American criminal jurisprudence," (*Coronado v. LeFevre*, 748 F.Supp. 131, 140 (S.D.N.Y. 1990)), and one of the hallmarks of our criminal justice system. It is the "'normal and ... preferable mode'" of resolving factual issues in criminal cases. *Singer v. United States*, 380 U.S. 24, 35; 85 S.Ct. 783 (1965).

24. The United States Supreme Court has said that "[w]aivers of constitutional rights must not only be voluntary, but must also be knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences." *Brady v. United States*, 397 U.S. 742, 748, 90 S.Ct. 1463 (1970).

25. The totality of the circumstances must be examined to determine whether there has been an "intelligent, competent, self-protecting waiver of jury trial." *Adams v. U.S. ex rel. McCann*, 317 U.S. 269, 278 (1942). (Emphasis added.) In this regard, "[in] order for a waiver to have been knowing and intelligent, the defendant must have understood the nature of the right and the consequences of waiving that right." *Coronado v. LeFevre*, *supra*.

26. The New York Court of Appeals has stated, "a defendant may not be forced to a trial before a jury if it sufficiently appears that his election to be tried without one was made knowingly and understandingly, based on an intelligent, informed judgment." *People v. Duchin*, 12 N.Y.2d 351, 353 (1963). Such a judgment must be made with a full awareness of the "consequences of the choices he is making." *Id.*

27. Pursuant to New York Constitution, Article I, § 2, a jury waiver must be "a written instrument signed by the defendant in person in open court before and with the approval of

a judge or justice of the court having jurisdiction to try the offense."

28. Similarly, CPL § 320.10(2) states, in pertinent part:

> Such waiver must be must be in writing and must be signed by the defendant in person in open court in the presence of the court, and with the approval of the court.

29. The Court of Appeals has identified the importance of adherence to the jury waiver procedure, stating:

> That the State Constitution itself unequivocally demands that the waiver of a jury trial be accompanied by a written instrument signed by the defendant in open court before the Trial Judge thus compels the conclusion that waiver must be accomplished in that manner. Such constitutional requirements are not lightly disregarded. To the contrary, express provisions of our Constitution should be vigilantly enforced and the rights they protect zealously guarded.

People v. Page, 88 N.Y.2d 1, 9-10, 665 N.E.2d 1041 (1996).

29. The dissent written by Your Honor recognizes the inherent deficiencies of the procedure followed by the County Court in improperly

obtaining a waiver of jury trial from Mr. Smith:

> In addition, in my view the People failed to discharge their burden of establishing that defendant waived his right to a jury trial in conformity with constitutional and statutory requirements (see NY Const, art I, § 2; CPL 320.10[2]; *People v. Davidson*, 136 AD2d 66, 70). The record does not establish that defendant actually signed the written waiver instrument in open court (see *People v. Finkle*, 262 AD2d 971, 972, *appeal dismissed* 94 NY2d 942; *Davidson*, 136 AD2d at 70). Nor does the brief exchange between the court and defense counsel support the inference that defendant's "waiver of so fundamental a right was 'made knowingly and understandingly, based on an intelligent, informed judgment'" (*Davidson*, 136 AD2d at 70, *quoting People v. Duchin*, 12 NY2d 351, 353).

30. The importance of a written jury waiver *executed in open court* was explicitly emphasized by the Fourth Department five years ago in its *Finkle* decision. There, the Court quoted directly from the Court of Appeals in warning that the *in open court* execution requirement was set in stone by State law: "That the State Constitution itself unequivocally demands that waiver of a jury trial be accompanied by a written instrument

signed by the defendant in open court before the Trial Judge thus compels the conclusion that waiver must be accomplished in that manner." *People v. Finkle, supra, quoting People v. Page,* 88 N.Y.2d 1, 9 (1996).

31. Notably, the majority opinion does not make even a single comment on this important constitutional and statutory issue. Despite the fact that the jury waiver issue was fully briefed and argued by the parties, the majority fails to even acknowledge the existence of appellant's challenge to the validity of the waiver. Appellant respectfully submits that the only reasonable explanation for the majority's silence on this crucial point is that any written decision approving the improper procedure followed below would run counter to the clearly established precedent of both the Court of Appeals and the Fourth Department requiring that jury waivers be executed in writing in open court.

32. The People's failure to prove that the jury waiver in the instant case was executed in open court is most certainly a serious question of law which ought to be reviewed by the Court of Appeals. CPL § 460.20 (1). The procedure followed in appellant's case violated one of the few remaining bright line rules of criminal procedure, and the Appellate Division's decision would create an exception to this traditionally iron clad rule that is not warranted by controlling precedent. Moreover, review by the Court of Appeals will

not only result in application of the correct rule of law, it will also serve to instruct trial courts across the State that the jury waiver procedure remains inviolate.

33. Additionally, as Your Honor pointed out in the dissenting opinion, the record is utterly deficient with respect to proof that appellant knowingly and intelligently waived his right to a trial by jury. In addition to failing to have the waiver executed in open court, the trial judge (1) did not explain the nature and consequences of the waiver, (2) did not inquire into appellant's understanding of the waiver, and (3) did not address appellant concerning the subject of the waiver. Accordingly, Your Honor concluded that, particularly in light of appellant's lack of any criminal record, "nothing in the waiver instrument or the record of the court proceedings provides any assurance that he was 'fully aware of the consequences of the choice he [was] making,'" as required by CPL § 320.10 (2).

34. There is no assurance in this record that appellant's waiver of his constitutional right to a trial by jury was done with a "sufficient awareness of the relevant circumstances and likely consequences." *Brady v. United States*, *supra*. The skeletal written waiver and the insufficiency of the in-court proceeding herein, mechanisms that are meant to memorialize the knowing and intelligent waiver of such an important constitutional right, are fatally flawed and cannot serve to ensure that

appellant's waiver was intelligent, competent and self-protecting. *Adams v. U.S. ex rel. McCann*, *supra*.

35. Accordingly, appellant respectfully submits that the serious deficiencies in the jury waiver process employed at his trial present important questions of law for the Court of Appeals' consideration. Review by the Court of Appeals in this case will result not only in the correction of a grievous legal error that will deny appellant his liberty without comment by the majority of the Appellate Division, but will also serve the salutary goal of reinforcing the proper jury waiver procedures required by statute, and by the State and Federal constitutions.

II. Appellant's Convictions Are Not Supported By Legally Sufficient Evidence.

36. The majority of the Appellate Division panel deciding this case rejected appellant's weight of the evidence and legal sufficiency arguments, noting that "[t]he testimony of the victim is unequivocal that she was asleep when she found defendant on top of and having sex with her."

37. In dissent, Your Honor concluded that the verdict was not supported by the weight of the evidence:

> Unlike the sleeping victims in the Third Department cases relied upon by the

> majority, complainant did not make an immediate outcry, fight off, or otherwise rebuff the alleged attacker. Rather, she testified that she fell back to sleep and deferred reporting the alleged attack until she spoke with her friend the following day. In addition, complainant testified that, during the purported rape, she could have communicated her unwillingness to engage in sexual intercourse, but elected not to do so. The conduct of complainant during and following the encounter with defendant undercuts the credibility of her allegation that the sexual act was nonconsensual as a result of her physical incapacity. (Citations omitted).

38. The Court of Appeals is obviously not empowered to hear weight of the evidence claims. *See, People v. Calabria*, 3 NY3d 80, 83 (2004). However, the Court of Appeals regularly reviews the sufficiency of evidence supporting convictions affirmed by the Appellate Division, and such review is warranted in the instant case.

39. Legal sufficiency review requires the Court to consider whether the trial evidence, viewed in the light most favorable to the People, *People v. Contes*, 60 N.Y.2d 620, 621, 467 N.Y.S.2d 349 (1983), could lead a trier of fact to conclude that each of the elements of the crime had been proven beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 99

S.Ct. 2781 (1979); *People v. Wong*, 81 N.Y.2d 600, 608; 601 N.Y.S.2d 440 (1933); *People v. Bleakley*, 69 N.Y.2d 490, 495; 515 N.Y.S.2d 761 (1987); *see also, People v. Hawkins-Rusch*, 212 A.D.2d 961 (4th Dept. 1995). When assessing the sufficiency of the evidence, the Court must "determine whether there is any valid line of reasoning and permissible inferences which could lead a rational person to the conclusion reached by the jury on the basis of the evidence at trial." *People v Rayam*, 94 N.Y.2d 557, 560; 708 N.Y.S. 2d 37 (2000) (citations omitted); *People v. Nickerson,* 175 A.D.2d 74, 77, 573 N.Y.S.2d 169 (1991).

40. Appellant respectfully submits that, even viewing the evidence in the light most favorable to the People, the trial proof did not constitute sufficient evidence that the complainant was "unconscious or for any other reason [was] physically unable to communicate unwillingness to an act." Penal Law § 130.00(7).

41. As Your Honor observed in dissent, the complainant had every opportunity to cry out or, at least, object to appellant's congress with her. She did not do so at any time, and even acknowledged on the stand that she *chose not to* communicate her unwillingness to the act. Appellant contends that these circumstances

cannot reasonably satisfy the legal standard of physical helplessness.[1]

42. Accordingly, appellant respectfully submits that this is an appropriate case for the Court of Appeals to consider for the purpose of defining the outer limits of the "sleeping victim" prosecution theory.

LEGAL ARGUMENT ON APPELLANT'S APPLICATION FOR A STAY OF JUDGMENT PENDING APPEAL TO THE COURT OF APPEALS

43. CPL § 460.60 authorizes a Judge who has received an application for leave to appeal to the Court of Appeals pursuant to CPL § 460.20 to also hear an application for a stay of judgment pending the further appeal.

44. Your Honor previously granted Mr. Smith appeal bail in the amount of $30,000.00 cash bail, which appellant promptly posted.

45. While he has been at liberty pending determination of his appeal by the Appellate Division, appellant has lived a law-abiding life and has remained constantly in contact with your deponent.

---

[1] Appellant also contends that the burglary conviction should fall if the rape conviction is overturned since the latter constituted the intent basis for the burglary charge.

46. Mr. Smith does not have any prior criminal record.

47. During the course of this appeal, Mr. Smith has continued working, and currently resides in New York City.

48. Appellant submits that the serious defects in the jury waiver process used by the Chautauqua County Court and the patently insufficient evidence offered in support of appellant's convictions present important legal questions for consideration by the Court of Appeals. Appellant further submits that, if leave to appeal is granted, there is a reasonable probability that the Court of Appeals will reverse the majority decision of the Appellate Division and order either a new trial or dismissal of the indictment altogether.

49. Moreover, it is clear by appellant's own conduct that he does not represent either a threat to the community or a risk of flight. He is cognizant of his obligations to the Court, and will comply with all conditions of continued release pending determination of his leave application.

WHEREFORE, appellant respectfully requests that this Court:

(1) Grant an immediate order staying execution of the judgment of conviction pending Your Honor's determination of appellant's application for leave to

appeal to the Court of Appeals and, if granted, staying the judgment until the final order of the Court of Appeals issues; and

(2) Upon reasonable notice to the People, issue an order granting appellant leave to appeal to the Court of Appeals.

/s/ Roger W. Wilcox, Jr.
Roger W. Wilcox, Jr.

Sworn to before me this
28th day of March, 2005.

/s/ Kristina Drewery
Notary Public

CERTIFICATE OF CONVICTION

State of New York
County of Chautauqua

THE PEOPLE OF THE STATE OF NEW YORK

vs.

MATTHEW A. SMITH
Date of Birth: 10-28-1968

The above-named Defendant having been arrested on 11-12-2002 and brought before the HON. JOHN T. WARD on 11-12-2002 was charged with the crime contained in IND 02-408. The Defendant pled guilty on 01-22-2004 to the charge of:

RAPE 1ST: INTERCOURSE FEMALE
PHYSICALLY HELPLESS
PL-130.35-02 B-FELONY

BURGLARY 2ND : ILLEGAL ENTRY DWELLING
PL-140.25-02 C-FELONY

The above named Defendant was sentenced on 04-19-2004 as follows:

SENTENCE:

CHARGE 1:

INCARCERATED WITH THE NEW YORK STATE DEPARTMENT OF CORRECTIONS FOR A TERM OF 7 YEARS; POST RELEASE SUPERVISION 3 YEARS.

CHARGE 2:

INCARCERATED WITH THE NEW YORK STATE DEPARTMENT OF CORRECTIONS FOR A TERM OF 7 YEARS; POST RELEASE SUPERVISION 3 YEARS, CONCURRENT WITH CHARGE No. 1; ORDER OF PROTECTION UNTIL 04-19-2014.

(SEAL) MAY 11, 2004

/s/ Kathleen D. Krauza
KATHLEEN D. KRAUZA
CHIEF CLERK, COUNTY COURT

STATE OF NEW YORK

COUNTY COURT: CHAUTAUQUA COUNTY

----------x

THE PEOPLE OF THE STATE OF NEW YORK

-against-- Indictment
No. 02-408

MATTHEW SMITH, Jury Waiver

Defendant.

----------x

Chautauqua County Courthouse
Mayville, New York
February 24, 2003

B E F O R E:

THE HON. JOHN T. WARD,

Justice.

A P P E A R A N C E S:

JAMES P. SUBJACK, ESQ.,
District Attorney, Chautauqua County
BY: DEREK GREGORY, ESQ.,
Assistant District Attorney

LEONARD E. KRAWCZYK, JR., ESQ.,
484 Delaware Avenue

Buffalo, New York 14202
Attorney for Defendant

KRISTA SMITH DWYER, CSR, RPR
Official Court Reporter

Proceedings

THE COURT: Have your client come right up here, counsel.

(Brief pause.)

THE COURT: We are here today, and we just conferenced the matter of People versus Matthew Smith, Indictment Number 02-408. And it is my understanding at this time that your client wishes to waive his right to a trial by jury and consent to a bench trial, to a non-jury bench trial.

MR. KRAWCZYK: Yes, your Honor.

THE COURT: Have you discussed the ramifications of waiving his right to a jury trial?

MR. KRAWCZYK: I have, your Honor.

THE COURT: Even though there is not a line for it, would you witness his signature?

MR. KRAWCZYK: Sure.

THE COURT: You are waiving a Jury trial, and we will have a bench trial. Did you have any luck getting a date?

MR. KRAWCZYK: April 23rd. It's a Wednesday, at 9:30.

Proceedings

THE COURT: See you then.

* * *

CERTIFIED TO BE A TRUE AND CORRECT
TRANSCRIPT OF THE FOREGOING
PROCEEDINGS.

/s/ Krista Smith Dwyer
KRISTA SMITH DWYER, CSR, RPR
Official Court Reporter

STATE OF NEW YORK

COUNTY COURT COUNTY OF CHATAUQUA

THE PEOPLE OF THE STATE OF NEW YORK

-vs- WAIVER OF JURY TRIAL
Ind. # 02-408

Matthew Smith,

Defendant

The above-named defendant having been charged in this Court by an accusatory instrument with violating Section 130.35-02 140.25-02 of the Rape 1st Burglary 2nd Law of the State of New York, a felony and having been advised by the Court of his right to a jury trial theron, after due consideration does hereby, pursuant to the provisions of Section 320.10 CPL waive his right to said jury trial and requests a trial by the Court on said charge.

/s/ Matthew Smith
Defendant

STATE OF NEW YORK
COUNTY OF CHAUTAUQUA : COUNTY COURT

THE PEOPLE OF THE STATE OF NEW YORK

-vs-

MATTHEW SMITH

Defendant

THE GRAND JURY OF CHAUTAUQUA hereby accuses the defendant, MATTHEW SMITH, of the crime of RAPE IN THE FIRST DEGREE, in violation of Section 130.35-2 of the Penal Law of the State of New York, a class "B" felony, committed as follows:

The said defendant, on or about the 30TH of July, 2002, in the Village of Fredonia, County of Chautauqua, State of New York, did engage in sexual intercourse with another person who was incapable of consent by reason of being physically helpless: to wit: the victim was intoxicated, asleep and physically unable to communicate unwillingness to the act.

COUNT TWO

AND THE GRAND JURY AFORESAID further accuses the defendant, MATTHEW SMITH, of the crime of BURGLARY IN THE SECOND

DEGREE, in violation of Section § 140.25-2 of the Penal Law of the State of New York, a class "C" felony, committed as follows:

The said defendant, on or about the 30TH day of July, 2002, in the Village of Fredonia, County of Chautauqua, State of New York, knowingly entered or remained unlawfully in a dwelling with intent to commit a crime therin: to wit: the residence located at 154 Central Avenue, Apt #1, Fredonia, New York.

In compliance with the New York Civil Rights Law, the name of the victims is not set forth in this Indictment, but is being filed separately with the Clerk of the Chautauqua County Court.

/s/ James B. Subjjack
JAMES B. SUBJJACK
District Attorney
Chautauqua County

05-1382

No. ____

FILED
MAY 25
OFFICE OF THE
SUPREME COU

IN THE SUPREME COURT OF THE UNITED STATES

MATTHEW SMITH,

Petitioner,

-v-

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

GRACE M. HANLON
Counsel of Record
Assistant District Attorney
Chautauqua County District Attorney's Office
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TRACEY A. BRUNECZ, of Counsel
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SUMMARY OF ARGUMENT

The petition for writ of certiorari should be denied. The New York Court Appeals decision in the matter of *People v. Smith*, 2006WL796983 (2006 N.Y. Slip. Op. 02408) requires a trial court to ascertain whether the defendant gave a knowing, intelligent and voluntary waiver and determined in this instance that the record sufficiently reflected such a waiver. This decision does not conflict with rulings set forth by the United States Supreme Court or decisions rendered by other state high courts regarding the federal constitutional standards for a waiver of jury trial.

PETITIONER'S WAIVER OF JURY TRIAL MEETS MINIMUM FEDERAL STANDARDS AND THE NEW YORK COURT OF APPEALS DECISION DOES NOT CONFLICT WITH PRIOR RULINGS OF THE SUPREME COURT

There is little question that the Court has required that in order for a waiver of jury trial, a fundamental right guaranteed by the United States Constitution, to be effective the waiver must be made knowingly, intelligently and voluntarily. *Patton v. United States*, 281 U.S. 276, 50 S. Ct. 253 (1930). There is also little question that the Court has ruled that a waiver of a fundamental constitutional right cannot be inferred from a silent record. *Boykin*

v. Alabama, 395 U.S. 238, 89 S.Ct. 1709 (1969). The Court, however, has never required a particular catechism to be followed when determining whether a defendant has made a knowing and intelligent waiver. In neither *Patton* nor *Boykin*, did the Court set forth any particular procedure to be followed by trial courts to ensure the record would not be silent and that it would adequately reflect a voluntary waiver.

In fact, the Court has long chosen not to set forth a particular procedure to be followed with respect to waivers of constitutional rights. The Court has rather taken the approach that the appropriateness of each waiver must be determined on the unique facts of that case, *see, e.g., Johnson v. Zerbst*, 304 U.S. 458, 464, 58 S.Ct. 1019, 1023 (1938) (waiver of right to counsel must depend on particular facts of each case); *Adams v. United States ex rel. McCann*, 317 U.S. 269, 278, 63 S.Ct. 236, 241 (1942) (competent waiver of jury trial must depend on unique circumstances of each case) or has stated that by setting forth a certain procedure it effectively causes them to engage in rulemaking, a legislative, not a judicial function. *See, e.g., Barker v. Wingo*, 407 U.S. 514, 523, 92 S.Ct. 2182, 2188 (1972)

(specifying a time period within which a trial should be conducted would require the Court to engage in legislative activity); *Singer v. United States*, 380 U.S. 24, 35, 85 S.Ct. 783, 790 (1965) (waiver of constitutional rights ***can*** be subjected to reasonable ***procedural*** regulations, citing Federal Rules of Criminal Procedure 7(b), 20, and 44) (emphasis added).

Against this backdrop it is apparent that the New York Court of Appeals decision in the instant case is not contrary to the rulings of the Court and that minimum federal standards were met by the procedures employed by the courts below.

First, the record is not silent with respect to the petitioner's waiver of his right to a jury trial. There is a written document which on its face states the petitioner was aware of his right to a jury trial and wished to waive that right. This document was also signed by the petitioner and witnessed by his trial counsel. The signing of this waiver was accompanied by an appearance in open court in which the trial court asked trial counsel, in petitioner's presence, whether he had discussed the ramifications of the waiver with his client. Trial counsel answered in the affirmative. The petitioner then executed the document. Petitioner's appendix at

35-37. Thus, it cannot be said that this is the silent record of which *Boykin, supra.* disapproved.

Additionally, the procedure followed by the trial court and approved by the New York State Supreme Court Appellate Division, Fourth Department and the New York Court of Appeals adequately assured the trial court that the petitioner was knowingly and intelligently waiving his right to a jury trial. While petitioner argues that he was "in the midst of his first involvement in the criminal justice system" nonetheless, the particular circumstances of this case are that the trial court was aware that petitioner was a well educated individual and was also familiar with trial counsel through the various pretrial conferences that were held throughout the pendency of the case. Thus, even though the colloquy may have been brief, given the circumstances, it was sufficient to cause the judge to be assured that petitioner was knowingly, intelligently and voluntarily waiving his right to a jury trial – the only standard mandated by the U.S. Supreme Court.

Lastly, petitioner argues that the trial court is required to follow a long, detailed colloquy in order to determine whether the standard for waiving a federal constitutional right has been met.

This approach, however, confuses meeting a prescribed judicial standard with following a legislative procedure. As previously noted, the Court has never required that a particular procedure be followed in order to determine whether the standard has been met.

THE NEW YORK COURT OF APPEALS DECISION DOES NOT CONFLICT WITH THE STANDARDS FOLLOWED BY OTHER STATE HIGH COURTS

It is well settled that the states cannot provide their citizens less protection that what is mandated by the United States Constitution, yet the states a free to enact more stringent requirements if they so desire. *See, California v. Ramos,* 463 U.S. 992, 1014, 103 S.Ct. 3446, 3460 (1983) (states are free to provide greater protections in their criminal justice system than the Federal Constitution requires). Thus, every state in the country must follow the standard set forth by this Court that a waiver of jury trial must be given knowingly, intelligently and voluntarily and several states have indeed enacted procedures, either through their state constitutions or criminal procedure law, requiring their trial courts to follow certain procedures in order to ensure the federal constitutional standard is met. In *Singer v. United States, supra. at*

36-37, 791 the Court made note of some of the procedures so enacted by various states.

Many states, however, have chosen not to require a specific procedure or catechism to be followed when determining whether a waiver of jury trial meets the constitutional standard. *See, Brown v. State,* 277 Ga. 573, 592 S.E.2d 666 (2004) (defendant's consent to waive the right to a jury trial need not be in a particular, ritualistic form; the only real issue is whether he intelligently agreed to a non-jury trial); *Abeokuto v. State,* 391 Md. 289, 893 A.2d 1018 (2006) (when determining whether defendant has knowingly and voluntarily waived his right to a jury trial, questioner need not recite any fixed incantation); *State v. Foote,* 149 N.H. 323, 821 A.2d 1072 (2003) (when a defendant waives an important constitutional right, the trial court is not always required to conduct a colloquy); *State v. Newton,* 108 Ohio St.3d 13, 840 N.E. 2d 593 (2006) (defendant need not have a complete or technical understanding of the jury trial right in order to knowingly and intelligently waive it, and the trial court is not required to inform defendant of all the possible implications of the waiver). Despite their lack of a required catechism, all of these courts,

however, require that a waiver of jury trial meet the federal standard of a knowing, intelligent and voluntary waiver.

Petitioner argues that because states follow different procedures that there is a conflict with respect to the standard that is being applied by their courts. This, obviously, is not true. One state may require a more detailed colloquy and may require the court to address the defendant, but if another court does not follow this procedure, it does not necessarily follow that the court is not applying the appropriate standard. As has been noted above, all states are required to follow the same federal standard, and they do. Some states have chosen to enact more stringent procedural standards, as is their right. New York has chosen to take a less stringent procedural approach, but nonetheless has applied the appropriate federal constitutional standard required of all state courts.

CONCLUSION

The petition for writ of certiorari should be denied because the decision by the New York State Court of Appeals meets minimum federal standards, does not conflict with prior rulings made by the United States Supreme Court and does not conflict

with decisions made by the high court of other states with respect to a defendant's waiver of his right to a jury trial.

Respectfully submitted,

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